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Supreme Court of the United States
OCTOBER TERM, 1997

HON. THOMAS R. PHILLIPS, *et al.*,
Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, *et al.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

**BRIEF OF
THE TEXAS JUSTICE FOUNDATION
AS AMICUS CURIAE
SUPPORTING RESPONDENTS**

David L. Wilkinson*
17589 Wadell Court
Hamilton, Virginia 20158
(540) 338-9537

Allan E. Parker, Jr.
Texas Justice Foundation
8122 Datapoint Dr., Suite 812
San Antonio, Texas 78229
(210) 614-7157

*Counsel for the Texas Justice
Foundation, amicus curiae*
*Counsel of Record

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INTEREST OF AMICUS CURIAE

The Texas Justice Foundation is a nonprofit corporation that provides free legal representation in cases involving the protection of individual rights and/or cases which seek to limit government to its proper role. It is deeply concerned with the protection of private property rights for individual citizens. It provides significant legal services to low income individuals without charge.

The Texas Justice Foundation since its inception in 1993 has appeared in cases before this Court and the Texas Supreme Court.¹

SUMMARY OF ARGUMENT

The petitioners and all but one of the scores of amici curiae supporting them go out of their way to convince this Court that a decision favoring respondents will have a deleterious effect upon the delivery of legal aid because the interest from IOLTA programs is usually used to help fund legal aid programs. Some of the amici offer funding statistics to attempt to prove to the court how important IOLTA interest is to the attainment of equal access to justice. Yet none of the amici inform the Court that in Texas individual members of the Bar, acting alone or through organized pro bono programs, donate well over one million hours a year to free legal advice and representation of Texas indigents. And none of the statistics offered include in their calculations the value of those hours—which the State Bar of Texas has placed at over one hundred

¹ Statement required by Supreme Court Rule 37.6. This brief has been exclusively authored by the Attorneys for Amicus Curiae whose names appear on the cover of this brief. Neither of them is an attorney for any of the parties to this lawsuit. There was no monetary contribution to the preparation or submission of this brief by any person or entity other than the amicus curiae.

million dollars annually. Nor do they show how small a percentage of the total resources devoted to legal aid comes from interest from IOLTA programs. Of course the petitioners and the *Amicus Curiae* parties who link this case with legal aid realize, as the Ohio parties frankly concede, that:

. . . the point is not strictly germane either to the narrow legal determinations of whether a "property interest" exists or what "just compensation" requires under the peculiar circumstances of IOLTA programs. . .

Amicus Curiae Brief of the Columbus Bar Association, et al. In Support of Petitioners, 20. The point, to paraphrase the Ohio parties, is not germane at all.

However, the petitioners and all *Amici Curiae* except the United States devote substantial space to this non-germane point. The Ohio parties even contend ". . . it is impossible to decide this case entirely in a vacuum that would divorce it from its important practical consequences." *See id.* A group of attorneys general list separately, as one of their arguments, that "The States Have Important Interests in Providing Open Access to the Courts and in the Administration of Justice." *Amicus Curiae* Brief of State Attorneys General In Support of Petitioners, 45 (Aug. 25, 1997). Finally, the American Association of Retired Persons seriously contends that this Court consider and decide other challenges to IOLTA presented by respondents below, but left open and not presented by the petition to this Court, because legal services providers "desperately" need the interest from IOLTA programs *Amicus Brief* of the American Association of Retired Persons, et al., Urging Reversal of the Judgment Below, 15-16

The Texas Justice Foundation does not disagree that, for example, states have an important interest in providing equal

access to justice for all their residents. But it does challenge the common premise of petitioners and their supporting parties that an issue as important as the proper scope of governmental taking without just compensation is somehow secondary in importance to their fears that civil legal aid would be dealt a serious blow if this Court affirms the decision of the Fifth Circuit. And it further challenges the statistics presented as being selective and misleading in purporting to convey the importance of interest generated by IOLTA in Texas and the rest of the country relative to pro bono programs and other public and private funding.

Finally, the Texas Justice Foundation challenges the contention of several *Amicus Curiae* parties that a substantial amount of IOLTA interest is used by state courts for projects to further the administration of justice (apart from providing equal access to justice) because there is not adequate funding for the judiciary. In Texas, not one cent of IOLTA money is used for this purpose and the amounts used therefor in other states is inconsequential.

ARGUMENT

I. THE AMOUNT OF INTEREST GENERATED BY THE TEXAS IOLTA PROGRAM AS A PERCENTAGE OF ALL RESOURCES DEVOTED TO LEGAL AID FOR THE INDIGENT IS ALMOST INSIGNIFICANT.

A. The Conservatively Measured Value of Pro Bono Time Devoted to Civil Legal Aid for the Indigent by Over 67,000 Texas Lawyers Is the Backbone of the Texas Delivery System.

Since 1992, the State Bar of Texas has attempted to ascertain systematically the amount of pro bono time devoted by all its attorney members. Beginning with the 1994-95 bar fiscal year, it has supplied each member attorney with a form, along with a dues statement, for the attorney to use to report voluntarily the number of his or her pro bono hours during the last twelve months. The State Bar has not compiled the figures for the twelve-month reporting period which ended in May, 1997. For the prior two reporting periods, however, 26,185 and 25,728 attorneys, respectively, completed and returned the form along with his or her dues.²

From the responses it received, the State Bar compiled the number of pro bono hours reported during the reporting period. For each of the periods ending May, 1995, and May, 1996, respectively, that number slightly exceeded one million.³ This total number included only the hours actually reported. The State Bar did not attempt to extrapolate the number of hours which were spent by the majority of the State Bar attorney members who did not return a pro bono reporting form. Obviously many additional hours over and above the one million

² DEPARTMENT OF RESEARCH AND ANALYSIS, STATE BAR OF TEXAS, PRO BONO REPORTING, JUNE 1995 THROUGH MAY 1996, Page 3 (1996).

³ *Id.*

hours reported each year were donated but not reported.

The State Bar has not placed a dollar value per hour in its Pro Bono Reporting compilations since 1992 but it did place a value of \$140 per hour in its report for 1992.⁴ More recently, the President of the State Bar suggested a value of \$100 per hour.⁵ One hundred dollars is also the assigned value of each hour of attorney pro bono work in the 1992 study by Justice Howard Dana of the Maine Supreme Court, relied upon by the American Bar Association ("ABA") *Amicus Curiae* Brief of American Bar Association In Support of Petitioners, 2 (Aug. 25, 1997). Using that figure, the value of attorney pro bono time for legal aid for the indigent in Texas exceeds \$100,000,000 annually.

That the State Bar of Texas annually compiles pro bono data which then becomes available to the public is a well known fact to over 67,000 Texas lawyers who receive each year a dues statement and pro bono reporting form. It is certainly known to the petitioners who nevertheless state confidently that "The American IOLTA concept . . . has become the backbone of pro bono programs throughout the United States." Brief for Petitioners, 3 (Aug. 25, 1997).

The above data clearly demonstrates that Texas lawyers who provide each year well over \$100,000,000 in donated time are the backbone of legal aid programs and delivery in Texas, not Texas' IOLTA program which this year generated only \$4,500,000.⁶

⁴ STATE BAR OF TEXAS, 1992 ANNUAL PRO BONO REPORTING RESULTS 2 (1993).

⁵ *State Bar of Texas President Responds to ABC TV Program*, SOUTHWEST NEWSWIRE, Jan. 9, 1996, at 3, available in LEXIS, News Library, Curnws File.

⁶ *Restrictions Considered For IOLTA Grant Recipients*, TEXAS LAWYER, September 1, 1997, at 1, available in LEXIS, News Library, Curnws File.

B. Legal Aid Grants Made Possible by Interest Generated by Texas' IOLTA Program Have Decreased in Amount Between 1992 and 1997.

In Texas, unlike many other states, all of the interest earned by IOLTA has been used to support legal aid. The amount of all legal aid grants made by petitioner Texas Equal Access to Justice Foundation (TEAJ) each year to Texas legal aid providers has steadily declined from 1992 to the present. The total amount granted each year, which comes from interest yielded by IOLTA, is set forth below for the period in question. The grant year for TEAJ is from July 1 to June 30:⁷

<u>Grant Year Ending</u>	<u>Total Grants</u>
1993	\$9,360,000
1994	7,190,000
1995	5,729,000
1996	5,199,000
1997	5,264,000
1998	4,906,000

Beginning in the 's, interest from IOLTA has been the third largest source of support for legal aid in Texas, behind only pro bono hours and funding from the federal Legal Services Corporation ('LSC'). However, the Texas Legislature enacted during its past session Senate Bill 1534 which made available additional court filing fees to provide basic civil legal services to the indigent. The legislation, which became effective September 1, 1997, is estimated to generate as much as \$5 million annually.⁸ If that occurs, state filing fee monies could

⁷ TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, SUMMARY LISTS OF RECIPIENTS BY ORGANIZATION NAME, AMOUNT GRANTED AND GRANT PURPOSE, May 22, 1996; May 19, 1994; 1993; 1992; 1997-1998 Grantees (Revised by Board on 6/6/97); *Legal Aid Cuts Magnify IOLTA Woes*, TEXAS LAWYER, August 14, 1995, at 5, available in LEXIS, News Library, Curnews File.

⁸ *Filing Fee Bill*, TEXAS LAWYER, October 14, 1996, at 1, available in LEXIS, News Library, Curnws File.

surpass interest from IOLTA as the third greatest support source in the state.

C. Interest from IOLTA in Texas Now Constitutes Only Three Percent of All Resources Devoted to Legal Aid.

The last year for which funding data for Texas legal aid efforts is available is 1994. And even that data includes only the total funding of the legal aid providers which received grants from the LSC.⁹ That funding, combined with the value of all the pro bono efforts of only those Texas lawyers who voluntarily reported their hours, totalled \$124,718,000.¹⁰ Interest from IOLTA included in that amount was \$4,163,000.¹¹

The total funding of all LSC grantees for calendar year 1994 combined with the value of reported pro bono in that period is as follows:

Value of Reported Pro Bono	LSC Grantee Funding And Pro Bono Value	LSC Grantee IOLTA
\$86,946,000	\$124,717,000	\$4,163,000

⁹ The Dana study, referred to in the *Amicus Curiae* Brief of the ABA, *supra*, at 2, also included only the total funding of legal aid providers in Texas who received grants from the LSC, presumably because information as to the total funding of all providers in Texas, including those who received no LSC grant, was unavailable. That is the reason why only the total funding of LSC grantees in Texas for 1994 is presented. The Dana study, entitled "1991 Funding For Civil Legal Services of the Poor," is a ten page report dated Nov. 29, 1992, and can be obtained from the ABA.

¹⁰ The value of the reported pro bono hours for 1995 was calculated by adding half of the hours reported for the twelve month reporting period ended May, 1995, to half of the hours reported for the twelve month reporting period ended May, 1996, and multiplying the sum by \$100.

¹¹ This amount differs from both the total amount of grants for the grant year ended 1994 and the total amount of grants for the grant year ended 1995 because this amount only includes IOLTA grants received by LSC grantees.

The percentage of all funding which came from IOLTA interest was only 3.3%. (\$4,162,000 divided by \$124,717,000).

II. PETITIONERS ASSUMPTION THAT AN ADVERSE DECISION WILL TERMINATE ALL IOLTA PROGRAMS ISUNFOUNDED, BUT IN ANY EVENT THE AMOUNT OF INTEREST GENERATED BY ALL IOLTA PROGRAMS AS A PERCENTAGE OF ALL RESOURCES DEVOTED TO LEGAL AID FOR THE INDIGENT IS QUITE SMALL.

Petitioners and their supporting parties seem to assume that if the Texas IOLTA program is struck down, then *ipso facto* all other 49 viable IOLTA programs in the nation are invalid. However, if this Court affirms the Fifth Circuit holding, it is not at all certain that a significant portion of IOLTA interest will be permanently lost to the states. It is well known — and documented in the briefs — that some of the states adopted their programs through legislative action. See e.g., *Amicus Curiae* Brief of the Council of State Governments, *et al.* Supporting Petitioners, 3 (Aug. 25, 1997). The taxing power of state legislatures presents new and very different legal considerations from those before this Court. If this Court affirms the Fifth Circuit's decision, it is quite conceivable that many more state legislatures will step forward and legislatively clone their states' IOLTA programs. It is just as conceivable that other state legislatures will reimplement IOLTA programs after having made significant changes in them, such as attaching conditions to the kinds of cases which legal aid providers may bring using IOLTA grant money, or providing that a specified portion of the monies should go to legal aid providers which follow a pro bono model of delivery rather than the staff model. In sum, it just cannot be assumed that a decision on the merits of the case before this Court favorable to respondents will result in the permanent or even temporary dismantling of 50 IOLTA programs nationwide.

But assuming that such a decision would result in the termination of many or even most IOLTA programs, the diminution of resources spent to support civil legal aid would be minimal. The amount of interest generated by all IOLTA programs quoted by petitioners and many supporting parties is \$100,000,000 annually. See e.g., Brief for the Petitioners, *supra*. Accepting that figure as correct, it represents less than a few percent of the total resources devoted to civil legal services in all the states, as the following shows:

The greatest single source of legal aid support nationally, as well as in Texas, is the millions of hours of pro bono provided annually by hundreds of thousands of lawyers and valued in the billions of dollars. State and city bar surveys taken since 1990 confirm these amounts. A 1991 California study determined that 68,000 lawyers in that state performed pro bono 5.7 million hours, valued by California state bar officials at \$850,000,000.¹² A 1992 study in New York showed that 48,000 attorneys there devoted 2,100,000 hours for pro bono legal aid, valued at \$210,000,000.¹³ Surveys taken in 1995 in Florida, Kentucky, New Mexico, Oregon, and Philadelphia, as well as Texas, taken together account for another 3,000,000 hours, valued at \$280,000,000.¹⁴ The lawyers in the bar associations

¹² Office of Legal Services of The State Bar of California, *Making Equal Access to Justice a Reality: A Report on the Status of Pro Bono Legal Services in California*, 72-73 (Nov. 1991).

¹³ VICTOR MARRERO AND JUSTIN L. VIGDOR, CO-CHAIR, FINAL REPORT OF THE PRO BONO REVIEW COMMITTEE 16 (Apr. 18, 1994).

¹⁴ STANDING COMMITTEE ON PRO BONO SERVICES, REPORT TO THE SUPREME COURT OF FLORIDA, THE FLORIDA BAR, AND THE FLORIDA BAR FOUNDATION 1 (1995); FLORIDA BAR JOURNAL, Dec., 1995, 30; Lynnette M. McFaull, *Lawyers Report Over 72 Thousand Pro Bono Hours*, KENTUCKY BAR NEWS, Spring, 1996, at 14; *Pro Bono Honor Roll*, BAR BULLETIN (New Mexico) Vol. 35, No. 35, Sept. 5, 1996, at 10; OREGON STATE BAR, 1994 ECONOMIC SURVEY 30 (Mar. 1, 1995); SAMUEL H. BECKER, CO-CHAIR, LONG RANGE PLANNING COMMITTEE, A LONG RANGE PLANNING REPORT: 1995 SURVEY OF LAWYERS, TABLES 068-069 (Oct. 29, 1995).

of these seven states and Philadelphia constitute 40% of all lawyers in the country.¹⁵ Assuming that these lawyers are representative of the total lawyer population, the annual worth of pro bono work done annually is over \$3.3 billion.¹⁶

In addition to IOLTA funding, legal aid providers receive cash funding from the Legal Services Corporation of over \$250,000,000 annually, plus a total of at least two hundred million dollars from state filing fees and general state legislative appropriations; county and city contributions; federal funding from agencies other than the LSC; and funding from bar associations and foundations, the United Way, and other private sector individuals and entities.¹⁷

The total value, then, of all resources committed to delivering civil legal aid to the indigent in the country is at least \$3.8 billion of which IOLTA's \$100 million is less than 3%.

III. AMOUNTS DERIVED FROM IOLTA INTEREST AND EXPENDED ON PROJECTS TO FURTHER THE ADMINISTRATION OF JUSTICE, APART FROM PROVIDING CIVIL LEGAL AID, ARE *DE MINIMIS* NATIONALLY: IN TEXAS, ALL IOLTA INTEREST GOES FOR LEGAL AID.

The state attorneys general parties state that, quite apart from providing open access to the courts, their states have important interests in the administration of justice; and note that IOLTA monies are spent on such projects of their bar associations as alternative dispute resolution programs,

¹⁵ Barbara A. Curran and Clara N. Carson, American Bar Foundation, *The Lawyer Statistical Report: The U.S. Legal Profession in the 1990s*, 235 (1994).

¹⁶ The sum of \$850 million, \$210 million and \$280 million is \$1.34 billion. This amount is to 40% as \$3.5 billion is to 100% (1.34 divided by .4 equals 3.35).

¹⁷ *LEGAL SERVICE CORPORATION, 1995 ANNUAL REPORT* 9 (1996).

victims services programs, minority law recruitment, programs, and law school scholarship programs. *Amicus Curiae Brief of the State Attorneys General In Support of the Petitioners, supra*, at 2-5.

In Texas, all IOLTA grants go to civil legal aid providers. (*See footnote 7*) (The Texas Attorney General did not join the brief of the other state attorneys general, although the office of the Texas Attorney General is representing the Texas Supreme Court petitioners herein, as is its duty.) Nationwide, the amount of IOLTA monies going for these non-legal aid projects is concededly only a few million dollars.¹⁸

CONCLUSION

This Court should decide the case before it on its own merits, quite divorced from whatever consequences its decision might be said to have on legal aid delivery systems in Texas and other states.

The enactment in Texas of recent legislation to provide at least several million dollars of new money for the provision of legal aid shows that legislatures are not unaware of the needs of the poor for adequate and appropriate legal assistance. The Texas bill, which contains conditions on how this money should be spent, stands in sharp contrast to the position of a legal aid provider *amicus* party that IOLTA monies are "desparately" needed to "replace the . . . restrictions placed on the use of those public funds [sic]." *Amicus Curiae Brief of the American Association of Retired Persons, supra*, at 16. The Texas Justice Foundation suggests that the Texas approach is much to be preferred to a system of court-implemented funding mechanisms which lead legal aid providers to believe there are no limits on how the monies can be used.

¹⁸ *Amicus Curiae Brief of the Council of State Governments Supporting Petitioners, supra*, at 4.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

David L. Wilkinson*
17589 Wadell Court
Hamilton, Virginia 20158
(540) 338-9537

Allan E. Parker
Texas Justice Foundation
8122 Datapoint Dr., Suite 906
San Antonio, Texas 78229
(210) 614-7157

*Counsel for the Texas Justice
Foundation, amicus curiae*

*Counsel of Record

October 10, 1997